

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

**FILED**

**APR 11 2016**

  
CLERK

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DAVID H. JOHNSTON,

Plaintiff,

vs.

ROBERT DOOLEY, Warden,  
Mike Durfee State Prison, in his  
official and individual capacities; and  
DENNIS KAEMINGK,  
Secretary of Corrections for the  
State of South Dakota, in his  
official and individual capacities,

Defendants.

CIV 15-4125

ORDER

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Plaintiff David H. Johnston, an inmate at the Mike Durfee State Prison, has filed a civil rights lawsuit pursuant to 42 U.S.C. § 1983. The Magistrate Judge issued a Report and Recommendation on November 10, 2015, recommending Counts I, II, III, VII, and VIII be allowed to go forward and that Defendants should be served and directed to file answers as to those Counts only. Plaintiff filed objections and requested permission to amend his Petition, which request was granted as to Counts IV, V, VI, IX, X, XI, XII, XIII, and XIV.

Plaintiff's amended Petition has now been screened and the Magistrate Judge issued a Report and Recommendation on December 21, 2015, recommending Count IX be allowed to go forward and that Defendants should be served and directed to file an answer to this and the other counts that have survived screening (I, II, III, VII, and VIII). The Magistrate further recommended Count XI be dismissed as frivolous for failing to state a claim upon which relief may be granted and the fact that Mr. Johnston never offered an amended version of Count XI after being given permission to do so; and that Amended Counts IV, V, VI, X, XII, XIII, and XIV should be dismissed as frivolous or failing to state a claim upon which relief may be granted. Plaintiff again filed Objections.

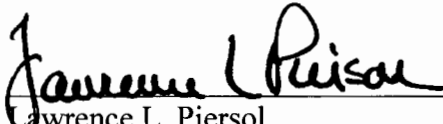
The Court has now conducted a *de novo* review of the file in this matter, and

IT IS ORDERED:

1. That the Magistrate Judge's Report and Recommendation, Doc. 16, is ADOPTED and Plaintiff's Objections to the Report and Recommendation, Doc. 19, are DENIED.
2. That Counts IV, V, VI, X, XI, XII, XIII, and XIV are dismissed as failing to state a claim upon which relief may be granted.
3. That Counts I, II, III, VII, VIII, and amended Count IX are allowed to go forward and the United States Marshal shall serve a copy of the Complaint, Summons, and this Order upon Defendants as directed by Plaintiff. All costs of service shall be advanced by the United States.
4. That Plaintiff shall serve upon Defendants, or if appearance has been entered by counsel, upon their attorney, a copy of every further pleading or other document submitted for consideration by the Court. He shall include with the original paper to be filed with the Court a certificate stating the date a true and correct copy of any document was mailed to Defendants or their counsel. Any paper received by a District Judge or Magistrate Judge which has not been filed with the clerk or which fails to include a certificate of service will be disregarded by the Court.

Dated this 11th day of April, 2016.

BY THE COURT:

  
Lawrence L. Piersol  
United States District Judge

ATTEST:  
JOSEPH HAAS, CLERK

By: 

Deputy